Supreme Court, U. S.
FILED
SEP 11 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-392

WILLIAM BROWN BURCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on July 1, 1975.

CITATIONS TO OPINIONS BELOW

Order of the Court of Appeals unreported filed July 1, 1975. (A-1)

JURISDICTION

The Court of Appeals entered judgment on July 1, 1975.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether the petitioner suffered a denial of due process under the Fifth Amendment through a harmful invasion of the jury's province by the District Court's instructions to the jury in which there was the explicit suggestion that the members of the jury should disregard totally the testimony of any witness whom they believed had lied and in which there was no guidance that they had the right to believe all or part or none of any witness's testimony.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner respectfully contends that Writ should be granted because the right to have the jury make an independent determination of the facts is an essential and fundamental element of due process under the Fifth Amendment.

STATEMENT OF THE CASE

Petitioner, William Brown Burch, was indicted in a one-count indictment for violation of Section 1201(a) of Title 18 USC in that he allegedly transported willfully in interstate commerce two persons who had been seized

unlawfully, confined, kidnapped, carried away and held for robbery, rape, and automobile theft.

The case was tried before a jury, and on June 12, 1974 petitioner was found guilty. On June 13, 1974 petitioner was given a life sentence by the Court pursuant to Section 4208(b) of Title 18 USC and was ordered to be transferred for evaluation to a medical facility for federal prisoners. On October 30, 1974 the Court reduced the sentence for imprisonment for a period of thirty-five (35) years.

Petitioner filed a proper Notice of Appeal and the case was heard by the United States Court of Appeals for the Sixth Circuit. Relief was denied by order of the Sixth Circuit on July 1, 1975. After a change of counsel on July 15, 1975, a motion to extend time for petition for rehearing was filed on July 22, 1975 and was granted. The petition was filed on July 22, 1975 and was denied on August 14, 1975. The petitioner is now properly before this Court.

STATEMENT OF THE FACTS

On January 25, 1973, four men seized a man and a woman from a parked automobile in Bell County, Kentucky. The man was robbed and both were bound and transported by their assailants to Tennessee. There the four men sexually assaulted the woman.

At the petitioner's trial the linchpin of the defense was the testimony of alibi witnesses that the petitioner could not have been present at the time of the mistreatment of the two victims.

In instructing the jury regarding the possibility that these alibi witnesses or any other witnesses might have lied, the District Court announced that it was his suggestion that the jury totally disregard the testimony of any witness whom they believed had lied.

ARGUMENT

Whether the Petitioner Suffered a Denial of Due Process Under the Fifth Amendment Through a Harmful Invasion of the Jury's Province by the District Court's Instructions to the Jury in Which There Was the Explicit Suggestion That the Members of the Jury Totally Disregarded the Testimony of Any Witness Whom They Believed Had Lied and in Which There Was No Guidance That They Had the Right to Believe All or Part or None of Any Witness's Testimony.

In his instructions to the jury at petitioner's trial the judge invaded harmfully the province of the jury by precluding the jury from its critical duty to assess the degree of credibility to be given each witness. Once the judge determined any witness to be qualified to speak at petitioner's trial, the belief of the jury in that witness's testimony rested solely with the jurors. *See United States* v. *Porjansky*, 465 F.2d 123, 136 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972) (no error in instruction to jury that veracity or credibility of testimony was solely their decision); IIIA WIGMORE ON EVIDENCE §1010 (Chadburn Rev. 1970). Nevertheless the judge at petitioner's trial instructed the jurors that, if they believed a witness had lied, it was his suggestion that they ". . . totally disregard the testimony of that witness." (A-2) No alternatives were given to the jury whose guidance on the law depended exclusively on the instructions of the judge. Because of this dependency, "[T]he influence of the trial judge on the jury is 'necessarily and properly of great weight' and his lightest word or intimation is received with deference and may prove controlling." *Quercia* v. *United States*, 289 U.S. 466, 470 (1933); *United States* v. *Ornstein*, 355 F.2d 222, 224 (6th Cir. 1966). The judge's

harmful influence on the jury at petitioner's trial was manifested not in a subtle light word or intimation but in an explicit suggestion that the jury had to accept or reject the entire testimony of each witness. With that misstatement of the law the judge initiated his crucially sensitive role, trespassed on the jury's function and responsibilities and thereby denied petitioner his right to have his innocence or guilt adjudged by the jury, as guaranteed by due process under the Fifth Amendment. *See United States* v. *Cisneros*, 491 F.2d 1068, 1074 (5th Cir. 1974); *Ornstein*, *supra* at 224.

Petitioner's jury had the right to believe all or part or none of the witness's testimony. *See United States* v. *Edwards*, 488 F.2d 1154, 1158 (5th Cir. 1974). Petitioner's jury, however, was never apprised of that right. Where the Court had instructed the jury to accept such portions of the testimony of the witnesses as they believed to be true and credible, the instructions were held to be reasonable and proper. *Costello* v. *United States*, 255 F.2d 389 (8th Cir.), *cert. denied*, 358 U.S. 830 (1958). Petitioner's judge instructed the jury to accept all or nothing of the testimony of a possibly mendacious witness. Where the judge had charged that the jury *could* disregard the entire testimony of the witness if it were false in part, the instructions were held not to be erroneous. *United States* v. *Passero*, 290 F.2d 238 (2d Cir.), *cert. denied*, 368 U.S. 819 (1961). The clear suggestion in the instructions at petitioner's trial was that the jury should, not could, disregard the entire testimony of a witness if it were false, even in part. Through that suggestion, the judge usurped the jury's exclusive responsibility to assess to what extent the testimony of any witness should be accepted. *Cf. United States* v. *Stephens*, 486 F.2d 915, 917 (9th Cir. 1973).

The effect of the charge at petitioner's trial should have been to instruct adequately, yet succinctly, the jury as to its function of determining independently the facts and applying the law as charged by the court to facts as found by the jury. *See United States* v. *Persico*, 349 F.2d 6, 8 (2d Cir. 1965). The result, however, at petitioner's trial was an intrusion of a misstatement of law into the determination of facts by the jury. Petitioner's conviction was decided by a jury that had been misled to believe that they should disregard totally the statements of a witness who might have testified falsely only in part. Thus the jury's guidance from the court was egregiously inadequate. *See* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §12.01 (2d ed. 1970) (juror gives the testimony of each witness such credibility, if any, as he or she may think it deserves); R. FORD & A. CLEMENTS, TRIAL JUDGES MANUAL OF CHARGES 165-66 (3d ed. 1959) (rule of law is that a juror *may* disregard the evidence of a person who has testified falsely to a material fact).

The effect of the judge's encroachment on the jury is incalculable. Petitioner's defense was based inextricably on the testimony of three witnesses as to his whereabouts at the time of the alleged offense. It was those witnesses' testimony that the misguided jury had to assess in the determination of petitioner's innocence or guilt. It is impossible to conclude that the judge's erroneous instructions did not affect petitioner's right to have the jury determine independently the facts. The Harmless Error Rule, therefore, is inapplicable. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot

stand." *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946); *Ornstein, supra* at 225 (conviction overturned even where no objection was made to judge's remarks at the time). Because the judge's instructions were a harmful invasion of the jury's province and a denial of petitioner's right to a degree about which there must be grave doubt, petitioner's conviction should be overturned.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of September, 1975 mailed a copy of the foregoing to the Solicitor General of the United States, Department of Justice, Washington, D.C.

DALE QUILLEN

APPENDIX

NO. 75-1110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

WILLIAM BROWN BURCH
Defendant-Appellant

ORDER

(Filed July 1, 1975)

BEFORE: CELEBREZZE, MILLER and LIVELY, Circuit Judges.

This is a direct appeal from a conviction of kidnaping. At his trial, the defendant elected to testify in support of his alibi defense. On cross-examination, he was asked about three previous convictions, and the jury was instructed to consider this evidence only as it related to the credibility of the defendant as a witness and that it should not be considered as substantive evidence on the charge for which he was being tried. Since the defendant's credibility was made an issue by his testimony, there was no error in permitting cross-examination on previous convictions of felonies or crimes involving moral turpitude when such testimony was accompanied by proper instructions limiting the purposes for which it could be received and considered by the jury.

We find no error prejudicial to the rights of the defendant in the district court proceedings. Accordingly, it is ORDERED that the judgment of conviction be and it hereby is affirmed.

Entered by Order of the Court

John P. Hehman, Clerk

By /s/ Grace Keller

Chief Deputy

EXCERPT FROM TRANSCRIPT

[Vol. II., 534-535] The Court: . . . If you believe that any witness who appeared in this Court lied, then I would suggest to you that you totally disregard the testimony of that witness.